STATE OF MICHIGAN

IN THE SUPREME COURT

GEORGE H. GOLDSTONE,

Plaintiff-Appellant

-vs-

Supreme Court No. 130150
Court of Appeals No. 262831
Oakland County No. 04-060611-CZ

THE BLOOMFIELD TOWNSHIP PUBLIC LIBRARY, by and through Its Board of Trustees,

Defendant-Appellee

_____/

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APPELLEE'S SUPPLEMENTAL BRIEF IN OPPOSITION TO APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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ARGUMENT

I. THE BLOOMFIELD TOWNSHIP PUBLIC LIBRARY IS NOT REQUIRED TO OFFER BORROWING PRIVILEGES TO NONRESIDENTS UNDER ANY INTERPRETATION OF ART 8, §9

A. MCR 7.302(G)(1)

On April 7, 2006, this Honorable Court issued an Order directing the Clerk to schedule oral argument on whether to grant the application of Plaintiff-Appellant George Goldstone, or take other peremptory action. While Defendant-Appellee Bloomfield Township Public Library (hereinafter referred to as "BTPL") welcomes any opportunity to present its case before the highest court in our State, it is disappointed that this Court would consider ruling on a case involving the very first interpretation of a section of the state constitution without granting the application and according full calendar case treatment to this matter. BTPL hopes that the arguments raised in this Supplemental Brief will convince this Court that this issue should not be addressed in a peremptory manner.

For purposes of this Supplemental Brief, BTPL will not reargue the position it has taken throughout these proceedings. As argued in opposition to the application for leave to appeal, BTPL firmly believes that the drafters of art 8, §9[1] intended to leave to the Legislature the method for making public libraries more available to the residents of the state. This position is supported by the plain meaning of the constitutional text and by the record of the lengthy debates

[1] The Legislature shall provide by law for the establishment and support of public libraries which shall be available to all residents of the state under regulations adopted by the governing bodies thereof. All fines assessed and collected in the several counties, townships and cities for any breach of the penal laws shall be exclusively applied to the support of such public libraries, and county law libraries as provided by law.

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between the drafters at the Constitutional Convention. There is no support in the text nor in the debates for the proposition that public libraries were to be required to offer borrowing privileges to nonresidents.

Nevertheless, BTPL acknowledges the possibility that a majority of this Court may conclude from the text of art 8, §9 that a library is not truly "available" to all state residents unless borrowing privileges are extended to nonresidents of the library's local service area. However, even under such a broad interpretation of the text, BTPL can demonstrate additional reasons why it should not be required to offer borrowing privileges to nonresidents.

B. Rule of Common Understanding

The majority of this Court subscribes to the rule of "common understanding" in construing the meaning of terms in our state constitution.[2] In applying this principle of construction, the people are understood to have accepted the words employed in a constitutional provision in the sense most obvious to the common understanding and to have "ratified the instrument in the belief that that was the sense designed to be conveyed". People v Nutt, 469 Mich 565, 573-574 (2004) (quoting 1 Cooley, Constitutional Limitations (6th ed), p 81).

The Court of Appeals' interpretation of art 8, §9 does not require public libraries to issue nonresident library cards or make accessible all services of local libraries to nonresidents. 268 Mich App at 652.[3] However, the Court of Appeals did not rely exclusively on the text of the constitutional provision to reach its conclusion. The Court relied heavily on the constitutional debates to determine the meaning of art 8, §9. Id.

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[2] This approach to judicial interpretation is also referred to as the "textualist" approach. See Corrigan, Textualism In Action: Judicial Restraint on the Michigan Supreme Court, 8 Tex Rev L & Pol 261 (2004).

[3] Goldstone v Bloomfield Township Public Library, 268 Mich App 642 (2005).

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It is permissible to look to the Constitutional Convention debates as aids in determining the intent of the ratifiers, even under the rule of "common understanding". People v Nutt, id at 574. However, the majority of this Court has stated that where the language is clear, there is no ambiguity that would permit or justify looking outside the plain words of the constitution or statute. This Court will not resort to legislative history to cloud a statutory text that is clear. In re Certified Question, 468 Mich 109, 116 (2003).

BTPL has taken the position throughout these proceedings that art 8, §9 is not clear as to what library services are to be made "available" to nonresidents of the library's service area, and to what extent the governing body of a library can regulate the services to be offered to nonresidents. Although the Court of Appeals did not characterize the provision as ambiguous, the Court relied heavily on the historical perspective offered by the convention debates to support its conclusion. 268 Mich App at 649-652. The Attorney General also relied extensively on the debates in reaching the opposite conclusion that art 8, §9 requires all public libraries to lend books to nonresidents. OAG, 1980, No. 5739, p 874.

BTPL contends that resorting to the constitutional debates is entirely appropriate in these circumstances because there is no obvious meaning as to what makes a library "available" or to what extent "availability" can be regulated by BTPL's governing board. The delegates of the Constitutional Convention foresaw this very issue and predicted that this Court would read the term "available" broadly. In response to this concern, the proposed language was amended to add the safeguard of "reasonable regulations" by the governing body of the library.[4] The delegates believed that this additional language would give the library the ability to override a broad interpretation of "available". 1 Official Record, Constitutional Convention 1961, p 836.

[4] The term "reasonable" was subsequently dropped from the final version of art 8, §9.

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(A-1).[5] This supports the Court of Appeals decision that the board of BTPL was within its rights to restrict the privilege of borrowing books to its residents. Ironically, if the constitutional text is not deemed to be ambiguous, then the debates of the drafters will not be considered at all.

In order to reverse the Court of Appeals under the rule of "common understanding", this Court would have to conclude that the ratifiers of this section understood it to mean that all state libraries had to offer borrowing privileges to all state residents. Such a conclusion, however, would ignore the rights of the governing bodies of the libraries to regulate such privileges. The extent of such regulation is not apparent from the text of art 8, §9 and resort to the debates would ultimately be necessary. As described in detail in BTPL's original brief, the debates clearly show that the drafters intended to leave the control of the library's books to the local governing boards.

However, if this court concludes that art 8, §9 requires that the libraries referenced therein provide borrowing privileges to all state residents, there are additional reasons why BTPL should still prevail on appeal.

C. Avoidance of Constitutional Issue

This Court adheres to the principle that constitutional issues, whether easy or difficult, are to be avoided where a case can be resolved adequately on non-constitutional grounds. In National Wildlife Federation v Cleveland Cliffs Iron Co, 471 Mich 608, 632 (2004), this Court quoted Justice Cooley on avoiding constitutional issues:

> In any case, therefore, where a constitutional questions [sic] is raised though it may be legitimately presented by the record, yet if the record also presents some other and clear ground upon which the court may rest its judgment, and thereby render the constitutional question immaterial to the case, the court will take

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[5] Appendix pages are designated as A-1, A-2, etc.

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> that course, and leave the question of constitutional power to be passed upon when a case arises which cannot be otherwise disposed of, and which consequently renders a decision upon such question necessary. Constitutional Limitations, ch 7, §2 (1868).
> Id at 632-633.

This case can be decided in favor of BTPL without resort to an interpretation of art 8, §9. That is because BTPL is not subject to art 8, §9.

BTPL was established and created prior to the effective date of art 8, §9, when public libraries were still subject to art 11, §14 of the Constitution of 1908:

> The legislature shall provide by law for the establishment of at least 1 library in each township and city; and all fines assessed and collected in the several counties, cities and townships for any breach of the penal laws shall be exclusively applied to the support of such libraries.

BTPL was established under the provisions of MCL 397.210, which provides, in part, that the residents of a township may vote to levy a tax on themselves for the establishment of a free public library (A-2). It is a matter of public record that the millage vote to establish BTPL took place on April 1, 1963. The first library board of trustees was elected and took office in August, 1963.

These dates are significant because the Constitution of 1963 did not become the supreme law of the state until January 1, 1964. Const 1963, art 12, §16. Therefore, BTPL is not subject to art 8, §9 unless it can be applied retroactively.

As this Court has stated, as a general rule, constitutional amendments operate prospectively and not retroactively. This is particularly so where the constitutional amendment would affect a substantive right. People v Gornbein, 407 Mich 330, 334 (1979). In Gornbein, the defendant was released on bail after being charged with a violent crime. After his release, the state constitution was amended to permit courts to deny bail to persons charged with certain

violent crimes while on probation. This Court refused to allow the state to apply the amendment retroactively to revoke the defendant's bail.

In Quaid v City of Detroit, 319 Mich 268 (1947), the issue was whether a vote on the issuance of public improvement bonds was later invalidated by a change in the constitutional eligibility of certain members of the electorate. In 1932, the state constitution was amended to allow all qualified women to vote on the issuance of bonds. Const 1908, art 3, §4. The amendment provided that the newly qualified persons "**shall be** entitled to vote" on the bond proposal. This Court then stated as follows:

> It is plain from a reading of this section that it is prospective in operation. It declares who *shall be* entitled to vote thereon, whenever any question is submitted to a vote of the electors which involves the direct expenditure of public money or the issue of bonds. It is impossible to read into the 1932 amendment the construction claimed for it by appellants, that it *invalidates* all such elections held prior to the effective date of the amendment because at the time of such election certain persons (although *then* not entitled to vote) were given the right to vote at later elections, from and after November 8, 1932, the effective date of the amendment. The change in the law after the 1928 election, as to the qualifications of electors, does not invalidate the election which was valid when held. Id at 276.

Art 8, §9 must be applied to libraries prospectively as well. Like the amendment in Quaid, art 8, §9 states that "**the Legislature shall provide by law** for the establishment and support of public libraries". This language is clearly prospective and cannot be applied retroactively without restricting the privileges of self-governance that the BTPL acquired under the 1908 Constitution.

When the BTPL was created, the state constitution required every township and city to establish its own library . Const 1908, art 11, §14 did not address residency because in concept, every person in the state would reside in a municipality with its own library. BTPL proceeded

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under the existing law of the land and properly established a free public library for the residents of Bloomfield Township, supported by the tax dollars of those residents. MCL 397.210. BTPL did what its neighbors could not or would not do. It created a library by its residents and for its residents within the mandate of the existing state constitution.

Retroactive application of art 8, §9 would effectively turn local libraries into state-controlled facilities. Libraries that were built by local residents, for local residents, to be governed by local residents would be answerable to the state's Department of History, Arts and Libraries if they failed to adhere to state-wide policies on "availability" of local services. The local regulation guaranteed by art 8, §9 would be nullified.

D. Art 8, §9 is Not Self-Executing

There is no dispute that a constitutional amendment, even when applied prospectively, can alter the rights of a person or public body that was in existence prior to the amendment. For example, art 4, §54 of the 1963 Constitution places limits on the terms of elected members of the Legislature. The amendment, which became effective on December 19, 1992, applied to all members of the Legislature whose terms began on or after January 1, 1993, regardless of whether they had been elected to office prior to the effective date of the amendment.[6]

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[6] No person shall be elected to the office of state representative more than three times. No person shall be elected to the office of state senate more than two times. Any person appointed or elected to fill a vacancy in the house of representatives or the state senate for a period greater than one half of a term of such office, shall be considered to have been elected to serve one time in that office for purposes of this section. This limitation on the number of times a person shall be elected to office shall apply to terms of office beginning on or after January 1, 1993.

This section shall be self-executing. Legislation may be enacted to facilitate operation of this section, but no law shall limit or restrict the application of this section. If any part of this section is held to be invalid or unconstitutional, the remaining parts of this section shall not be affected but will remain in full force and effect. (Emphasis added).

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The difference between art 4, §54 and art 8, §9 is that the former amendment is self-executing, while the latter is not. Where a constitutional amendment is not self-executing, it requires legislative action to implement its mandate. The Legislature has not passed any legislation to date that would require BTPL to offer borrowing privileges to nonresidents of Bloomfield Township.

Art 8, §9 is not drafted to be self-executing. It requires legislative action to lay down rules by means of which its principles may be given the force of law. Musselman v Governor, 448 Mich 503, 523 (1995). In that case, this Court referred to a quote from Justice Cooley in Davis v Burke, 179 US 399, 403; 21 S Ct 210; 45 L Ed 249 (1900):

> A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law. Thus, a constitution may very clearly require county and town government; but if it fails to indicate its range, and to provide proper machinery, it is not in this particular self-executing, and legislation is essential. Cooley, Constitutional Limitations, p 99. 448 Mich at 523.

Under Justice Cooley's definition, art 8, §9 is clearly not self-executing because it merely states the principles that all libraries are to be available to all state residents. Instead of stating what the libraries must do to make themselves available, art 8, §9 leaves it to the Legislature to enact legislation to implement the mandate.

The Legislature has not passed any legislation that requires a public library to issue nonresident library cards or allow borrowing of books by nonresidents. Unlike art 4, §54, art 8, §9 does not define what makes a library available nor does it prohibit certain activity by public libraries. Nor is there a statute that makes it illegal for a public library to deny borrowing privileges to nonresidents. In the absence of such legislation, art 8, §9 does not require BTPL to

issue a library card to Goldstone, because it is not self-executing.

E. Cooperative Libraries

The rule of "common understanding" requires this Court to apply from the constitutional text **each term's** plain meaning at the time of ratification. Wayne County v Hathcock, 471 Mich 445, 468-469 (2004). It is not enough to simply decide what the ratifiers believed would be "available" from public libraries. This Court has to take into account the text's directive that the Legislature "establish and support" the public libraries that are the subject of art 8, §9. If this Court does not interpret art 8, §9 to require legislative action, then it has not given effect to each and every term of the text.

The common understanding of the text requiring the Legislature to "establish" public libraries is that **new** libraries would be created that would be available to all residents of the state.[7] The Legislature has adopted legislation to implement art 8, §9. The State Aid to Public Libraries Act of 1977 (MCL 397.551 et seq) expressly relates to art 8, §9, and creates a new library system (A-3).

The preamble to the 1977 Act states that this is:

> AN ACT to provide for the establishment of cooperative libraries...

Cooperative libraries did not exist prior to 1977. They were established by the Legislature in response to art 8, §9.

The cooperative library system creates geographic areas of the state administered by the Department of History, Arts and Libraries. MCL 397.556. Every local public library in the state is eligible to join a cooperative if it meets the following criteria:

[7] As used in the text of the United States Constitution, "establish" means to create, to found as in "Congress shall have power to establish post offices". Story, Commentaries on the Constitution of the United States §454 (1833).

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Sec. 5. To be eligible for membership in a cooperative library, a local library shall do all of the following:

(a) Maintain a minimum local support of 3/10 of a mill on taxable value, as taxable value is calculated under section 27a of the general property tax act, 1893 PA 206, MCL 211.27a, in the fiscal year before October 1 of the year before distribution.

(b) Participate in the development of cooperative library plans.

(c) Loan materials to other libraries participating in the cooperative library.

(d) Maintain an open door policy to the residents of the state, as provided by section 9 of article VIII of the state constitution of 1963. (Emphasis added). MCL 397.555

The cooperative library is the library or service center designated to execute the services established by the cooperative plan. MCL 397.552(f). Each cooperative is governed by a library board representing the local public libraries in the cooperative. MCL 397.553. The cooperative board operates the cooperative library and among other specified duties, establishes, maintains and operates the cooperative services for the public libraries in the cooperative library's area. MCL 397.558. The act also provides for state aid for public libraries and **additional** state aid for public libraries belonging to a cooperative. MCL 397.566.

This legislation provides for the **establishment** and **support** of **public libraries** which are **available** to all residents of the state. One of the criteria for membership in a cooperative library is maintenance of "an open door policy to the residents of the state, as provided by [art 8, §9 of the state constitution]". MCL 397.555(d). Therefore, by definition, a member of a cooperative library must comply with art 8, §9.

Furthermore, this legislation provides for a remedy if a participating library does not make its services available as required by the statute:

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> Following establishment of a cooperative * * * board, residents of the cooperative library's area are eligible to use the facilities and resources of the member libraries subject to the rules of the cooperative library plan. Services of the cooperative library, including those of participating libraries, are to be available at reasonable times and on an equal basis within the areas served to schoolchildren, individuals in public and nonpublic institutions of learning, and a student or resident within an area. **An applicant refused service may appeal to the department, which shall review the operation of the cooperative library and may withhold state aid funds until the services are granted.** (Emphasis added). MCL 397.561.

The sanction for refusing to provide services as required by this act is the loss of state aid.

BTPL is a member of a cooperative. The cooperative board does not interpret MCL 397.555(d) as requiring BTPL to make borrowing privileges available to nonresidents. Nevertheless, because BTPL does not issue library cards to nonresidents, it only receives state aid based on the number of residents of Bloomfield Township, just as if it were not a member of a cooperative.

When BTPL's contract with the City of Bloomfield Hills expired in 2003, BTPL lost the additional state aid it had been receiving for including the residents of Bloomfield Hills in its service population. That state aid was redirected to the Oakland County Law Library, which serves all residents of Oakland County, including Mr. Goldstone. Thus, BTPL has already been sanctioned by the state, as provided in MCL 397.561, for refusing service to nonresidents.

Participation in the cooperative is voluntary. MCL 397.562. Therefore, compliance with the "open door policy" of art 8, §9 is voluntary as well. Whether BTPL should be permitted to remain in a cooperative if it does not offer borrowing privileges to nonresidents is not before this Court. The Legislature has left that decision to the cooperative board or, perhaps, the Department of History, Arts and Libraries. BTPL has already suffered the statutory penalty for

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its residency restrictions. The statute does not mandate compliance with an "open door policy" as well.

It is not a coincidence that the statutory borrowing fee for nonresidents is also found in the State Aid to Public Libraries Act. MCL 397.561a states as follows:

> A library may charge nonresident borrowing fees to a person residing outside of the library's service area, including a person residing within the cooperative library's service area to which the library is assigned, if the fee does not exceed the costs incurred by the library in making borrowing privileges available to nonresidents including, but not limited to, the costs, direct and indirect, of issuing a library card, facilitating the return of loaned materials, and the attendant cost of administration.

Borrowing fees for nonresidents were discretionary and commonplace before this statute was adopted. It was placed in the act that created cooperatives because the Attorney General raised an issue over whether a library could treat cooperative residents as nonresidents for purposes of charging a fee. See OAG, 1983, No. 6188 (October 17, 1983) (A-13); House Bill 5828 (A-21). The statute permits libraries to charge borrowing fees to any person outside of its service area. However, the statute is clearly permissive, and its placement in the State Aid to Public Libraries Act limits its application to only those libraries that belong to a cooperative. If a library is not a member of a cooperative because it does not adhere to an "open door" policy, it is difficult to see how MCL 397.561a could require that library to lend its books to nonresidents, even for a fee.

Under the rule of "common understanding", art 8, §9 cannot be read to refer to a library that existed on the date that the Constitution of 1963 was ratified. The text clearly contemplates the establishment of a new library system by the Legislature that would not be limited to local municipal residents.

Compare art 8, §9 with art 8, §2 which addresses the state's school system:

> The legislature shall **maintain** and **support** a system of free public elementary and secondary schools as defined by law. Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin. (Emphasis added).

Whereas the drafters of the 1963 Constitution required the Legislature to "establish" public libraries, they only required the Legislature to "maintain" the public school system. The distinction goes back to the Constitution of 1908. In the earlier Constitution, libraries were supposed to have been "established" in every township and city. Const 1908, art 11, §14. That objective was never attained. On the other hand, a primary school system had been "established" under the Constitution of 1850 (art 13, §4) and was merely "continued" under the Constitution of 1908 (art 11, §9) and "maintained" under the Constitution of 1963.

When the drafters of our various constitutions intended the Legislature to create something new, they used the term "establish". When they intended that something already established be continued or maintained, they used those terms to so indicate. The plain meaning of art 8, §9 is that the Legislature was to create a new library system that would be available to all residents of the state, as opposed to the existing libraries that were regulated by the municipalities in which they were established. The cooperative library system is the Legislature's response to art 8, §9. The text cannot be read to apply to existing libraries created under the prior constitution without ignoring the directive to the Legislature.

F. Conclusion

BTPL firmly believes that the drafters of art 8, §9 never intended to require existing local libraries to lend books to nonresidents over the objection of the libraries' governing boards. While that intention is undisputed from the constitutional debates, it can be gleaned from the text of the constitution as well.

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Moreover, the language of art 8, §9 clearly is to be applied prospectively and only to those libraries established by the Legislature under the mandate of art 8, §9. It is the cooperative libraries that are the subject of art 8, §9. If a library does not adhere to the criteria for belonging to a cooperative, it may face the loss of state aid or expulsion from the cooperative. However, there is no basis in the 1963 Constitution or in the state's statutes for requiring a public library, established before the adoption of art 8, §9, to offer borrowing privileges to nonresidents against the wishes of its governing body.

Even if this Court does not agree with the decision of the Court of Appeals, the result was correct and should be affirmed for the reasons set forth herein. However, if this Court determines that art 8, §9 requires interpretation, then it should only do so after granting leave to appeal and scheduling this matter as a calendar case.

Respectfully submitted,

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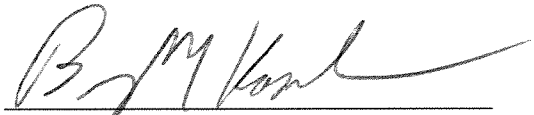
By: 

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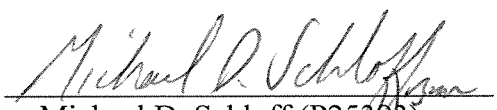
By: 

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